

Fond du Lac Band of Lake Superior Chippewa

Reservation Business Committee

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February 20, 2014



Dr. Susan Hedman, Administrator
US Environmental Protection Agency, Region 5
77 W. Jackson Boulevard
Chicago, IL 60604

Dear Administrator Hedman:

Chairwoman
Karen R. Diver

Secretary/Treasurer
Ferdinand Martineau, Jr.

Dist. I Representative
Wally Dupuis

Dist. II Representative
David R. Tieszen, Jr.

Dist. III Representative
Kevin R. Dupuis, Sr.

Executive Director,
Tribal Programs
Chuck Walt

Executive Director,
Enterprises
Michael Humingo

The Fond du Lac Band of Lake Superior Chippewa requests that EPA Region 5 review the recent Clean Water Act § 401 Certification issued by the Minnesota Pollution Control Agency (MPCA) for the proposed 483 acre US Steel Minntac extension and requisite CWA § 404 permit. The Fond du Lac and Grand Portage Bands jointly submitted comments to the US Army Corps of Engineers (USACE), the Minnesota Department of Natural Resources (MnDNR), and the MPCA regarding this project, clearly conveying our objection to the third recent expansion of this taconite facility while it continues to operate out of compliance with Minnesota water quality standards¹. Our comments to the MPCA also specifically requested that the agency bring this certification decision to the Citizen's Board for review, but in an email dated January 22, 2014, MPCA Assistant Commissioner Rebecca Flood notified the Bands, on behalf of Commissioner John Linc Stine, that the MPCA was denying our request for a Citizen's Board hearing and issuing the § 401 certification.²

According to EPA guidance on §401 certification,³ CWA § 401(a)(2) provides neighboring states or tribes downstream or otherwise potentially affected by the discharge with an opportunity to object to, and make recommendations for, federal licenses and permits.⁴ The EPA Administrator determines if a discharge subject to § 401 certification "may affect" the water quality of other states or tribes, and EPA is required to notify those other jurisdictions whose water quality may be affected. The downstream tribe may also request that the federal permitting or licensing agency hold a hearing at which, "the [EPA] Administrator shall ... submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency." The federal licensing or permitting agency "shall condition such license or permit in such manner as may be necessary to ensure compliance with applicable water quality requirements." If the Federal agency "cannot ensure compliance" with the other state or tribe's water quality requirements, it "shall not issue such license or permit."

The Fond du Lac and Grand Portage Bands have consistently maintained that the USACE should not issue any new CWA §404 permits to US Steel as long as the Minntac facility fails to meet Minnesota water quality standards, but the Corps has responded that they essentially cannot question compliance with Minnesota water quality standards if the

¹ See December 24, 2013 letter from Fond du Lac and Grand Portage Bands to Rebecca Flood, MPCA (cc Tinka Hyde, Kevin Pierard).

² See attached email.

³ <http://water.epa.gov/lawsregs/guidance/cwa/upload/cwa-401-handbook-2010-interim.pdf>.

⁴ CWA §401(a)(2); 33 USC 1341(a)(2).

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MPCA has issued a § 401 certification.¹ This circular logic results in not only continued permission for US Steel-Minntac to operate in exceedence of Minnesota standards, but also to successfully seek permits to expand, extend, and progress their mining footprint.

To date, the Fond du Lac Band has not been notified or invited to consult by EPA Region 5 regarding any § 401 certifications for any federal licenses or permits that may affect tribal waters, although our reservation lies downstream from multiple operating and proposed hard rock mining facilities. Our own monitoring data demonstrates that sulfate concentrations in the St. Louis River are elevated over background, and state research clearly identifies mining-influenced tributaries as a primary source of elevated sulfate within the St. Louis River watershed.² The St. Louis River, while impaired for mercury in fish throughout the watershed, remains Fond du Lac's most significant on-reservation fishery resource, and we consider it a Tier 2 (High Quality) waterbody. We have invested substantial efforts towards re-establishing lake sturgeon within their historic range in the St. Louis River, and seek to protect the necessary water quality and habitat for the sturgeon population to become self-sustaining. We aspire to be able to consume unlimited quantities of fish from reservation waters, but mercury methylation and bioaccumulation are enhanced at the elevated sulfate concentrations that persist far downstream of the mining discharges.

We ask that EPA Region 5 review this most recent CWA § 401 certification for US Steel-Minntac, fully considering impacts to downstream reservation water resources. We believe that MPCA's determination to issue the certification is not justified, and that the USACE § 404 permitting decision should be based upon a comprehensive and objective evaluation of the facility's ability to meet not only the state's water quality standards, but also to not cause or contribute to an exceedence of Fond du Lac's water quality standards.

Sincerely,



Karen R. Diver
Chairwoman

¹ Tamara Cameron, pers. comm.

² Berndt, M.E. and Bavin, T.K., 2012b. On the cycling of sulfur and mercury in the St. Louis River watershed, northeastern Minnesota, Minnesota Department of Natural Resources. An Environmental and Natural Resources Trust Fund Final Report. 91 p.